

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ED CAPITAL LLC,

4 Plaintiff,

5 v.

15 Civ. 9056 (VM)

6 BLOOMFIELD INVESTMENT RESOURCES
7 CORP., et al.,

8 Defendants.

Argument and Decision

9
10 New York, N.Y.
11 December 11, 2015
12 9:40 a.m.

13 Before:

14 HON. VICTOR MARRERO

15 District Judge

16
17
18 APPEARANCES

19 DRINKER BIDDLE & REATH LLP
20 Attorneys for Plaintiff
21 BY: RICHARD LOMUSCIO

22 REED SMITH
23 Attorneys for Defendants
24 BY: STEVEN COOPER
25 PETER GOURDINE

1 (Case called)

2 THE COURT: Good morning. This is a proceeding in the
3 matter of the ED Capital v. Bloomfield Investment Resources
4 Corp., Docket number 15 Civ. 9056. This proceeding was
5 scheduled as a hearing on the motion of the plaintiffs for
6 temporary and preliminary injunctive relief.

7 I have reviewed the material submitted by the parties
8 in favor and against the application. There are two, three
9 actually, major issues that arise from the submissions that the
10 parties should particularly focus on. One is whether the
11 plaintiffs have standing to bring the action on behalf of
12 another, third party, UMG, who is not a party to this action
13 but does appear in the proceeding in the Netherlands.

14 The second is, to what extent does the plaintiff's
15 case in this case satisfy the requirement of a showing of
16 irreparable harm, or is the plaintiff primarily seeking relief
17 for monetary loss, however much that may be?

18 Third, to what extent does the plaintiff's case here
19 meet the standard, the very high and rigorous standard, for
20 obtaining an antisuit injunction involving proceeding in a
21 foreign court, especially in the circumstances where the
22 underlying action in another court involves a third party who
23 is not a party in this action.

24 Why don't we focus primarily on those three issues.
25 If there is something else that the parties feel is

1 particularly compelling that I have not mentioned, feel free to
2 indicate so. Let's first set the basic ground rules of the
3 amount of time that we will allocate for argument on both
4 sides. Who speaks for the plaintiff? Is that Mr. Lomuscio?

5 MR. LOMUSCIO: Yes, your Honor.

6 THE COURT: How much time does plaintiff propose for
7 its initial presentation? Let me stress again I have read the
8 papers, I am familiar with the arguments and the issues. You
9 need not go into repetition of things that you already
10 thoroughly addressed in the papers. Just focus on the bare
11 essentials of the issues that you think are particularly
12 compelling of your case.

13 MR. LOMUSCIO: Ten minutes should be fine, your Honor.

14 THE COURT: Thank you.

15 And for the defendants, Mr. Cooper?

16 MR. COOPER: Yes, your Honor. Ten minutes would be
17 fine for me, too.

18 THE COURT: Why don't we proceed. Mr. Lomuscio.

19 MR. LOMUSCIO: Thank you, your Honor. Richard
20 Lomuscio of Drinker Biddle on behalf of the plaintiffs, ED
21 Capital entities. What I will do, your Honor, is address the
22 issues that you have raised at the beginning here.

23 First, the issue about whether the ED Capital entities
24 have standing here: They do. The harm here is to the ED
25 Capital entities, and it comes from the fact that they were the

1 invest- ment manager and the investment adviser in connection
2 with Bloomfield Investment in the Synergy funds. The Synergy
3 funds in turn have the wholly owned UMG. But the harm here is
4 flowing to the ED Capital entities.

5 The issue really is whether or not there has been a
6 violation or Bloomfield is acting outside the scope of what it
7 agreed to in the subscription agreement and the private
8 placement memorandum that it executed with the Synergy funds
9 and by, in turn, with the ED Capital entities, who are the
10 investment manager and the investment adviser of those funds.

11 We are not seeking really to redress a harm to UMG.
12 We are seeking redress to that is falling to ED Capital by
13 virtue of its investments by virtue of the Synergy funds'
14 investment in UMG. What will happen if UMG misses its bond
15 payment on December 20th is UMG will collapse, which in turn
16 will cause the collapse of the Synergy funds; the ED Capital
17 entities obtained substantially all of their management fees
18 and the like from their management of the Synergy funds, and
19 they in turn will collapse.

20 So the harm here is to the ED Capital entities. It
21 stems from Bloomfield's basically constantly ignoring the fact
22 that they are legally obligated to deal with this as an
23 investment and not a loan. In the Netherlands action, and also
24 in this action, Bloomfield has taken the position that they
25 have provided a loan to UMG. That is not the case. What

1 Bloomfield has done is they have invested in the Synergy funds,
2 which are managed by the ED Capital entities, and in turn the
3 Synergy funds have invested in UMG or wholly owned UMG.

4 THE COURT: Let me interrupt for a moment, Mr.
5 Lomuscio.

6 MR. LOMUSCIO: Sure.

7 THE COURT: The question may not necessarily be who
8 has been injured or whether or not ED Capital has suffered a
9 harm but whose rights you are seeking to enforce.

10 MR. LOMUSCIO: The rights we are seeking to enforce
11 here are ED Capital's rights, your Honor, under the
12 subscription agreement and under the private placement
13 memorandum.

14 THE COURT: Where does the third party to that
15 transaction come in? It appears to me that it is the third
16 party's rights that you are seeking to enforce by trying to get
17 injunctive relief against this defendant.

18 MR. LOMUSCIO: The injunctive relief we are seeking,
19 your Honor, is the release of UMG funds so that UMG can make
20 its bond payment. There is no reason why those funds should
21 not be attached in the Netherlands. The only basis for that
22 attachment is the fact that Bloomfield has taken the position
23 that somehow these were a loan to UMG.

24 THE COURT: Why isn't the Netherlands court the
25 correct forum for the argument to be made and for that relief

1 to be sought?

2 MR. LOMUSCIO: The ED Capital entities are not parties
3 to the Dutch action, and they don't have the ability to go into
4 the Dutch action in an expedited manner whereby they would not
5 face irreparable harm of the December 20th date.

6 THE COURT: What is to avoid the potential that the
7 Dutch action may reach one result and that result may be
8 inconsistent with what this Court may grant?

9 MR. LOMUSCIO: Two things, your Honor. One is, by its
10 own admission, the Dutch court won't even be hearing anything
11 on this case until at least 2016. ED Capital is in this court.
12 ED Capital is in New York and can proceed on a expedited basis
13 and get the declaratory relief it seeks under the subscription
14 agreement and the memorandum.

15 Q. How do you understand that can be done inside the next six
16 months?

17 MR. LOMUSCIO: Because we think it is a very straight-
18 forward issue. It is an interpretation of documents as to the
19 obligations of Bloomfield and the ED Capital entities under
20 those documents. That is something I think could be done very
21 quickly, your Honor, of course on your Honor's schedule.

22 THE COURT: Let's pursue that. Assuming that the
23 Court granted temporary relief subject to a trial or resolution
24 of the merits later on, would you need discovery of any kind?

25 MR. LOMUSCIO: As to the declaratory judgment overall?

1 To the extent we would need any discovery, it would be very
2 targeted. But we don't need much discovery on the key point,
3 which is the obligations on the subscription and the
4 memorandum.

5 THE COURT: Would that discovery, if there is any, be
6 required in the Netherlands or somewhere outside of this
7 country?

8 MR. LOMUSCIO: We would think that Bloomfield, who has
9 taken a position in the Netherlands action, they sought
10 discovery through this court in that action, would be able to
11 do this in New York.

12 THE COURT: If you were not, then you would need to
13 take discovery pursuant to the Hague Convention?

14 MR. LOMUSCIO: Possibly pursuant to the Hague
15 Convention, your Honor.

16 THE COURT: Have you ever had a case where you had
17 discovery through the Hague Convention?

18 MR. LOMUSCIO: Yes, I have, your Honor.

19 THE COURT: How long did that take you?

20 MR. LOMUSCIO: It took a little while, your Honor.

21 THE COURT: You get my drift.

22 MR. LOMUSCIO: Yes, I understand. But, your Honor, as
23 to the key issue which we are focused on, which is ED Capital
24 is suffering harm under the declaratory judgment and the
25 obligations on the subscription agreement and the memorandum,

1 that issue we believe could be tried within a month. We don't
2 need substantial, if any, discovery on that point.

3 THE COURT: All right. Anything else?

4 MR. LOMUSCIO: The other piece, in terms of harm -- we
5 have talked about this in our papers and I won't go into it in
6 detail -- there is obviously reputational harm which goes to
7 the irreparable nature of what the ED Capital entities will
8 suffer here. If this is a failure of UMG, which is the primary
9 investment of the ED Capital entities through the Synergy
10 funds, if that fails, ultimately the managers of that fund will
11 be irreparably harmed and not be able to recover from that if
12 they have a reputation of not being able to properly manage
13 funds.

14 To go to your second question, your Honor, to what
15 extent have we satisfied the requirement of irreparable harm,
16 here ED Capital believes we have, your Honor, in two respects.
17 One is the threat of the failure of UMG, which is in turn the
18 threat of the failure of the ED Capital entities. You can't
19 unscramble the egg if that happens. There is case law we have
20 cited in our papers about that, your Honor.

21 Your third question, to get to it quickly, is the
22 antisuit injunction point. While we recognize that it is a
23 high standard, we believe there are extraordinary circumstances
24 presented here. What you are dealing with is a situation
25 where, if the bond payment missed by UMG, you have not only the

1 collapse of UMG, you will have the collapse of the Synergy
2 funds and in turn the collapse of the ED Capital entities.
3 Here, the real parties in interest here, even though they may
4 not be the same exact parties in the Dutch action, the real
5 parties at interest here are the ED Capital entities as a
6 result of that harm that will be suffered.

7 One final point, your Honor.

8 THE COURT: Let me go back to the question of who are
9 the real parties in interest. In an antisuit injunction, as
10 you know, the court is not enjoining the proceeding.

11 MR. LOMUSCIO: I understand, your Honor.

12 THE COURT: It is enjoining the parties. How could
13 this court enjoin a party who is not a party to this action?

14 MR. LOMUSCIO: You are enjoining a party who is a
15 party to this action. The party you would be enjoining would
16 be Bloomfield.

17 THE COURT: There is another party to the transaction
18 also, who is the party in the Netherlands. Would they not need
19 to be enjoined as well?

20 MR. LOMUSCIO: UMG would not need to be enjoined, your
21 Honor. Just Bloomfield is a party. Bloomfield would need to
22 be enjoined. You would be instructing Bloomfield for the
23 temporary relief to release the funds which are in a UMG
24 account which has been improperly attached on the basis that
25 Bloomfield's theory that what they have engaged in with UMG is

1 a loan and not an investment through the ED Capital entities.

2 THE COURT: Assuming that happened and Bloomfield made
3 the payment to UMG, how do you get access if UMG doesn't then
4 pay you?

5 MR. LOMUSCIO: The payment is just the continued
6 existence of UMG. We would eventually get paid in turn as long
7 as UMG continues as a viable entity and continues to grow and
8 is allowed to grow if it doesn't miss its bond payment.

9 THE COURT: All right. Can you wrap up.

10 MR. LOMUSCIO: Your Honor, for the reasons in our
11 papers and that we discussed today, the ED Capital entities
12 here have suffered and will suffer irreparable harm if the bond
13 payment is not made by UMG on December 20th. We have come to
14 this Court on an expedited basis for that reason.

15 We believe that the key aspect of this case and the
16 key dispute between the ED Capital entities and the defendants
17 here depends upon an interpretation of the subscription agree-
18 ment and the memorandum, and we believe that a declaratory
19 judgment action or trial could be heard on that on an expedited
20 basis. There would be no harm to the status quo, the status
21 quo being the destruction of ED Capital and UMG if the funds
22 were released in the Netherlands and we are allowed to proceed
23 on an expedited basis here in this court.

24 Thank you, your Honor.

25 THE COURT: Thank you.

1 Mr. Cooper.

2 MR. COOPER: Good morning, your Honor. Your Honor,
3 there are really so many defects with this application. I am
4 going to try to get them in in my ten minutes. If I can take
5 them out of order.

6 First of all, this question of the relief that they
7 are seeking, and I'll combine that with the antisuit
8 injunction. The relief that they are seeking is a little in
9 and of itself unusual. Bloomfield cannot release funds. The
10 court in the Netherlands attached the funds. Plaintiff's
11 counsel interchanges the release of the funds and some other
12 actions that need to be taken. But at best, all this Court
13 could order would be the that Bloomfield be compelled to make
14 some sort of application. Ultimately, it is up to the Dutch
15 judge, what is done there.

16 The reason this doesn't belong here, among many
17 others, is because this relief could have been sought in the
18 Netherlands. In fact, in July of this year, July 15th, and it
19 is in our papers as Exhibit 1 to Mr. van Dam's affidavit, an
20 application was made to the court to release funds for bond
21 payments by UMG.

22 In that decision the court first of all went through
23 the facts exhaustively, showing that the Court is very much
24 steeped in what's going on in this dispute, gave credibility to
25 Bloomfield's position regarding the fact that this is a loan,

1 and did not release the attachment entirely, it only released
2 enough to provide for bond payments. That could have been done
3 in the Netherlands. There is no explanation in the papers as
4 to why that wasn't done.

5 To make matters worse and to show that there really
6 are credibility issues here regarding the plaintiff's
7 application, this week we received two communications through
8 our Dutch co-counsel indicating that they are planning on going
9 back to the Dutch court. I can hand one up to the Court if you
10 like. It's a letter from UMG. Do I have the Court's
11 permission?

12 THE COURT: Sure. When you say "they" are planning --

13 MR. COOPER: UMG. That's the party, UMG. By the way,
14 your Honor, there shouldn't be any doubt that all of these
15 entities are controlled by one individual, Elliot Daniloff.
16 They are not separate entities. Mr. Daniloff is running the
17 show. Mr. Daniloff is behind what is going on in the
18 Netherlands, and now he is behind what is going on here.

19 The last paragraph, your Honor, says, "In the absence
20 of such confirmation," meaning that Bloomfield is going to
21 release the funds, "we will, as announced in the letter of
22 November 10, 2015, now finally be compelled to again initiate
23 interim injunctive proceedings forthwith seeking a lifting of
24 the attachment."

25 The second communication, I can't hand it up because

1 it originally was in Dutch and my co-counsel translated it.
2 But I can represent to the Court that there is a new counsel
3 for UMG now in the Netherlands who says, "My client has no
4 other option than once again to sue your client in summary
5 proceedings. Please provide us ultimately 2 p.m. tomorrow with
6 your dates of unavailability until Christmas to schedule a
7 hearing." This is dated December 9th.

8 There are very serious questions here as to why this
9 was brought here, what's behind this. The standing issue is, I
10 think, dispositive, and it was not addressed in the reply brief
11 by the plaintiffs.

12 This is an indirect injury, there is no question about
13 it. If you listen carefully to plaintiff's counsel's argument,
14 he kept using the terms "flowing to" or "in turn it damages."
15 That is the quintessential definition of an indirect or
16 derivative damage. That's what this is.

17 There are a lot of derivative injuries as a result
18 potentially of the collapse of UMG to my client and any other
19 stakeholders. But under the law this arises as an injury
20 directly from UMG. It's UMG's money. The attachment is on
21 UMG's account.

22 We are not once removed. We are twice removed. ED
23 Capital is the plaintiff here, but they are not the funds that
24 they even allege that Bloomfield invested in. Bloomfield
25 invested in Synergy. These are the managers. So it's not UMG

1 who has the injury and it's not the shareholder of UMG which
2 they say we invested in, which is Synergy. It's a separate
3 entity, this investment manager, all of whom again are
4 controlled by Mr. Daniloff.

5 Legally, there is no question I would say to the Court
6 that this is an indirect derivative injury, and the law is
7 crystal clear that a shareholder cannot bring claims unless
8 they do it as a derivative action on behalf of an entity that
9 it invested in.

10 On the issue of irreparable harm, obviously a very
11 high standard, as is the standard on antisuit injunctions,
12 there is no financial information whatsoever presented to you
13 about ED Capital's situation. That's the entity that they are
14 saying is going to be irreparably harmed. No financial
15 information. The only financial information that is provided
16 is an unaudited letter from an accountant with regard to UMG.
17 So we have no idea whether this in fact will result in even
18 what they say.

19 And they say in their papers that this is not their
20 only holding; they say this is one of their holdings. We have
21 no idea what their other holdings are. We don't know what
22 their capitalization is. They are saying just accept the fact
23 that there is irreparable harm here. They offer absolutely no
24 proof of it. Threat of failure under the law is not a
25 definition of irreparable harm.

1 The cases they cite to satisfy it are domain names
2 being stolen and knocked off and palmed off or franchises being
3 discontinued. This is where you find irreparable harm. You
4 don't find it in classic situations where a shareholder is
5 going to lose money in an underlying business fails.

6 The representation that this is not going to come to
7 fruition in the Netherlands until mid 2016 is not true. First
8 of all, they had it in their control to bring it before the
9 Dutch court any time they wanted. In fact, you will see our
10 papers that we wrote to them I think two, three months ago
11 saying what's going to happen with the next bond payment, and
12 they never responded. This was like in August.

13 Then in November, all of a sudden it's a hurry up,
14 hurry up, hurry up, we want you to release the money, we want
15 you to release the money. If you look at the correspondence
16 back and forth, we are asking the very same questions that I am
17 presenting to you today. What is the financial situation?
18 What other holdings do these companies have? Is Razvitiye, if
19 I pronounce it right, Bank in fact unequivocally telling you
20 that they are not going to honor the CD? The letter just says
21 it gets suggests that they might. We don't know that.

22 These are all fact issues. We asked these questions,
23 got no answers. All we got repeatedly was release the money.
24 Then they run to the New York court instead of going to the
25 Dutch court. What their motivation is in coming here I don't

1 know, but it is the wrong party asking for extreme relief
2 making an extreme claim of irreparable harm, and they don't
3 satisfy any of those elements.

4 THE COURT: Thank you.

5 Mr. Lomuscio, I will give you a couple of minutes.

6 MR. LOMUSCIO: Thank you, your Honor. I will just
7 address a couple of points raised by defense counsel. One is
8 UMG very well is taking all steps necessary to release the
9 funds because it recognizes that if the December 20th date is
10 not met, it will be in default with its bondholders and will be
11 in a position where it might collapse, will collapse.

12 THE COURT: Let me ask you something there. Assuming
13 that they are taking all of those steps in good faith and that
14 they succeed before December 20th, where does that put your
15 client?

16 MR. LOMUSCIO: It puts my client seeking the
17 declaratory relief we are seeking and asking for an expedited
18 hearing on that piece.

19 THE COURT: All right.

20 MR. LOMUSCIO: If the bond payment is made, we are in
21 a position where we need the expedited hearing. Their entire
22 theory is that somehow they have provided a loan to UMG when in
23 fact what they have done, as defense counsel appears to concede
24 today, is invest in the Synergy funds, which are managed by ED
25 Capital and the ED Capital entities.

1 In terms of why it was in November, it was not until
2 November, a couple of days before we brought this action, we
3 learned that UMG learned that the funds would not be available
4 from Bank Razvitiye. I apologize also for the pronunciation.
5 The fact is those funds are not available.

6 Back in August UMG believed those funds would be
7 available and possibly be available for the bond payment. But
8 they are not available, and that is the reason that we have had
9 to bring this action here in New York on behalf of the ED
10 Capital entities.

11 The other question: Why New York? The ED Capital
12 entities are located on Third Avenue. They are in New York.
13 Bloomfield has come to New York in connection with the Dutch
14 action seeking discovery in New York from the ED Capital
15 entities. So we are properly here in this court bringing this
16 action.

17 Thank you, your Honor.

18 THE COURT: Thank you.

19 MR. COOPER: Your Honor, could I make one small point
20 that I omitted?

21 THE COURT: Yes.

22 MR. COOPER: Thank you. One other serious question is
23 whether this suit is even moot. In two places in Mr.
24 Daniloff's affidavit, paragraphs 33 and 47, he says
25 unequivocally that if the relief is not granted by December

1 7th, then he cannot get the funds released in time. It's
2 December 11th. There has been no follow-up information
3 provided to the Court.

4 I can read you the paragraphs but I don't know that
5 that is necessary. He says, "Without access to the funds, the
6 Netherlands court is told us by December 7, 2015, UMG will be
7 unable to make the upcoming bond payment." In paragraph 46 he
8 gives even more detail on that.

9 At a minimum it's a credibility issue as far as what
10 Mr. Danilooff is saying here. What else is not a hundred
11 percent accurate in this application? I'll leave it at that.

12 THE COURT: Thank you. I think I have heard enough of
13 the presentation. And I have, as I have indicated earlier,
14 carefully reviewed the submissions in support of and in
15 opposition to the plaintiff's request.

16 Mr. Lomuscio, I am not persuaded that the plaintiff
17 has made a sufficiently compelling case for injunctive relief
18 here, essentially for the reasons that I indicated earlier that
19 I asked you to address in particular. I am not persuaded that
20 the plaintiff has made a sufficient showing of standing under
21 the circumstances of this case or that the plaintiffs have
22 shown irreparable harm to the plaintiff from these
23 circumstances.

24 I also believe that plaintiff has not made a
25 sufficiently compelling case that injunctive relief by way of

1 an antisuit injunction is appropriate here under the relevant
2 factors: frustration of a policy in the enjoining forum, the
3 foreign action being allegedly vexatious or a threat to the
4 issuing court's interim jurisdiction, or the proceedings in the
5 other forum prejudicing equitable considerations.

6 I think these are all very rigorous standards that
7 apply for a court in this country to enjoin the proceeding in
8 another country. Consequently, I believe that it would be
9 inappropriate for this Court to issue such relief. I will
10 issue an order forthwith embodying the Court's ruling and
11 encompassing the transcript of this proceeding.

12 Thank you.

13 MR. COOPER: Your Honor, there was a cross-motion to
14 dismiss. I don't know if that is subsumed in your decision
15 that there is no standing. Or are you taking that under
16 consideration?

17 THE COURT: I will take that under consideration. But
18 it is essentially subsumed.

19 Mr. Lomuscio?

20 MR. LOMUSCIO: Your Honor, thank you. With regard to
21 our request for a hearing on the declaratory relief, will you
22 be taking that under consideration?

23 THE COURT: We will do the same. Again, the issue is
24 if the Court believes that you have not made a showing of
25 irreparable harm or that you are likely to succeed on the

merits, that implicates the question of declaratory relief.

The order that I will issue will cover those questions as well.

MR. LOMUSCIO: Thank you, your Honor.

(Adjourned)